IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICK J. CRIMMINS	:	CIVIL ACTION
v.	:	
ARCO CHEMICAL COMPANY, et al.,	:	NO. 98-4251

Newcomer, J. April 1999

M E M O R A N D U M

Presently before the Court are the parties motions for summary judgment, plaintiff's response to defendants' motion, and both parties response to the Court's Order of March 1, 1999. For the reasons that follow, plaintiff's motion will be denied for the time being, and defendants' motion will be granted in part and denied in part.

I. Background

Plaintiff, Patrick J. Crimmins, was an employee of ARCO Chemical Company ("ACC")or("ARCO") from January 1, 1966 until July 23, 1985. At the end of his employment in 1985, plaintiff elected not to take an enhanced retirement with ACC because he was still desirous of future employment with ACC. In April of 1989, ACC and EniChem SpA ("Enichem") created a 50/50 joint venture, ENARCO Elastomer Company ("ENARCO").

As a joint venture in the nascent stage of development, ENARCO relied heavily on ARCO to provide key management personnel. The management personnel supplied by ARCO remained as salaried employees of ARCO, and ARCO retained control over such matters as discipline and removal of these managers. Plaintiff was hired by ENARCO as a northeast regional sales manager to sell synthetic rubber, and he began working for ENARCO on or about

April 1, 1989. His immediate supervisor was Darrel Nagle, who had responsibility for the day-to-day supervision and discipline of plaintiff. Both Nagle and Crimmins were on ENARCO's payroll. Nagle's supervisor was Leonard Halpern, who was an ACC employee, and through Halpern had the authority to disciple and fire plaintiff. By January 31, 1990, Mr. Crimmins was again out of a job as the joint venture dissolved.

Plaintiff is eligible to begin receiving his retirement benefits under the ACC plan on or about October 1, 2000. In February of 1998, Mr Crimmins wrote a letter to Atlantic Richfield Company requesting that his service with ENARCO be included in the ACC plan. Atlantic Richfield denied this request on the grounds that the ACC plan did not recognize service with ENARCO. Plaintiff's administrative claims were also denied by the ACC Retirement Plan Committee, and later by the Lyondell Benefits Administrative Committee, after Lyondell Chemical Company purchased ACC and assumed fiduciary responsibility for the ACC Plan.

In the instant suit, plaintiff argues that he should receive credit under ACC's Plan for the time he spent at ENARCO. He has suggested three possible theories under which he is entitled to these benefits. First he argues that he was in actuality an employee of ACC for the ten months he worked at ENARCO. Second, he argues that even if he was not an employee, ENARCO was the alter ego of ACC, thereby entitling him to credit for his service under the ACC plan. Third, plaintiff argues that defendants credited three former ENARCO employees for the time they spent at ENARCO under the ACC plan, and therefore are estopped from

denying him the same benefit. Plaintiff has moved for summary judgment on his claim of entitlement to credit under the ACC plan for his time at ENARCO. Defendants have filed a cross motion for summary judgment, arguing that the determinations made by the ACC and Lyondell Committees denying plaintiff's claim were not arbitrary and capricious. Defendants deny plaintiff's allegations that plaintiff was an employee of ACC, that ENARCO was the alter ego of ACC, and that any former ENARCO employees received credit under ACC's plan for the time served at ENARCO.

II. Standards of Review

A. Summary Judgment

A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988). The evidence presented must be viewed in the light most favorable to the non-moving party. Id. "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In deciding the motion for summary judgment, it is not the function of the Court to decide disputed questions of fact, but only to determine whether genuine issues of fact exist. Id. at 248-49.

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988).

The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings and designate specific facts, by use of affidavits, depositions, admissions, or answers to interrogatories, showing that there is a genuine issue for trial. Id. at 324. Moreover, when the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987) (quoting Celotex, 477 U.S. at 322). Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322).

B. Arbitrary and Capricious

The Court in this case must also determine the standard of review applicable to the decision of the Lyondell Committee. "[A] denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S. Ct. 948, 956-57, 103 L. Ed. 2d 80 (1989); Heasley v. Belden and Blake Corp., 2 F.3d 1249, 1256 (3d Cir. 1993)(holding that a plan containing a clear statement of discretion warrants

arbitrary and capricious review under Firestone). Section 13.11 of the Plan states:

> The Administrator shall have full discretion in making an independent determination of the applicant's eligibility for benefits under the Plan and shall have full discretion to construe the terms of the plan in making its review. The decision of the Administrator on any application for benefits shall be final and conclusive upon all persons.

ACC Plan § 13.11. Because the plan contains a clear statement of discretion, the Administrator's decision warrants arbitrary and capricious review. "Under the arbitrary and capricious (or abuse of discretion) standard of review, the district court may overturn a decision of a Plan Administrator only if it is 'without reason, unsupported by substantial evidence or erroneous as a matter of law.'" Abnathya v. Hoffman-La Roche, Inc., 2 F.3d 40, 45 (3d Cir. 1993) (quoting Adamo v. Anchor Hocking Corp., 720 F. Supp. 491, 500 (W.D. Pa. 1989).

III. Discussion

A. Defendants' Motion for Summary Judgment

1. The Decision of the Committee.

On February 5, 1998, Mr. Crimmins wrote the ACC Plan Administration and requested that he be credited under the ACC Plan for the time he worked at ENARCO. This request was denied on February 23, 1998, because, according to ACC, the Plan does not have any provision to recognize ENARCO service. On March 9, 1998, Crimmins, through his attorney John B. Day, appealed the denial to the ACC Retirement Plan Committee. In the appeal, Crimmins says that:

> It is Mr. Crimmins' contention that Federal Law (i.e. ERISA) requires that Atlantic Richfield recognize Mr. Crimmins' service to Enarco Elastomers Company because there was an

> employer/employee relationship between Atlantic Richfield and Mr. Crimmins during this ten month period. Essentially, Mr. Crimmins contends that Enarco Elastomers Company was but the alter ego of Arco Chemical, as the term alter ego is used in Lumpkin vs.[sic] Envirodyne Industries, Inc.[,][933] F.2nd [sic] 449 (7th Cir. 1991)...[.]

(Def. Ex. F). On June 9, 1998, the Committee denied plaintiff's appeal, stating that plaintiff did not meet the definition of employee under the plan, that the Plan as written specifically excluded service through ENARCO, and that there was no amendment authorizing ENARCO service to be counted. The Committee also rejected plaintiff's Lumpkin claim, finding no merit in the argument.

On September 22, 1998, plaintiff's attorney appealed the decision to the new owners of ACC, the Lyondell Petrochemical Benefit Plans Committee. Plaintiff concedes that the ACC Plan as written, excludes him from coverage under the ACC Plan, but argues that the June 9, 1998 decision "totally fails to answer my client's contention that federal law, as announced in the decisions cited by me requires that ENARCO be treated as the corporate alter ego of ARCO Chemical and, as such, my client must be credited with ten months service for the time in question." Plaintiff references his March 9, 1998 letter in support of his argument that ENARCO is the alter ego of ARCO, and cites Teamsters Pension Trust Fund v. H.F. Johnson, 830 F.2d. 1009 (9th Cir. 1987) as supporting the proposition that two owners in a joint venture are subject to the pension benefits of an employee in a joint venture. Plaintiff then closes his letter by saying "the only reason advanced by Mr. Crimmins[] to support his claim is the proposition that, as a matter of federal law, ENARCO is

the alter ego of Arco Chemical Co. Thus, the letter of June 9, 1998 rejects a theory of recovery never made buy my client."

On October 28, 1998, the Lyondell Committee denied plaintiff's appeal. The Committee gave three reasons for denying plaintiff's claim. First, the plain language of the Plan did not support service recognition for ENARCO employees, since ENARCO was not a subsidiary or affiliate of ACC recognized as a Company for service credit purposes, nor did ENARCO adopt the Plan. Second, according to the Committee, Plan interpretation does not support recognition for ENARCO employees. Although discussions were conducted concerning recognizing ENARCO service under the ACC plan for former ENARCO employees who were subsequently hired by ARCO, it was determined that these employees would not get service credit. The Committee stated that non-ARCO employees hired by ENARCO and then hired by ARCO were not given credit, but ARCO employees temporarily working at ENARCO were given credit. Finally, the Lyondell Committee rejected plaintiff's alter ego argument, saying that neither the structure of the joint venture (ACC's 50% interest) nor ACC's actions (including providing management expertise, use of the same address, and listing ENARCO phone numbers in its phone book) evidences the type of fraudulent intent to avoid pension liability which supported alter ego status in Lumpkin. The Committee also noted that ERISA does not require an employer to allow all employees to participate, and an employer may exclude employees from participating as a matter of plan design.

Plaintiff argues that this decision was arbitrary and capricious, and cites three flaws that evidence the bias of the

Lyondell Committee against plaintiff and demonstrates the arbitrary and capricious nature of the decision. First, plaintiff argues that the Lyondell Committee made a statement that ENARCO maintained a pension plan for ENARCO employees, which is simply wrong. Second, plaintiff argues that the Lyondell Committee mischaracterized plaintiff's claim and "thoroughly perverted" plaintiff's concession that he was not an employee as defined by the plan. Finally, plaintiff argues that the Employee Relations Department of ARCO awarded pension benefits to three ENARCO employees who worked at the same office as plaintiff, but denied the benefits to the plaintiff. The Court will address these in reverse order.

2. Plaintiff's Arguments that the Decision is Arbitrary and Capricious.[1]

Plaintiff claims that three ENARCO employees, John Patti, Mary Lynn Mansfield, and Patricia Sylvester, received credit for their service at ENARCO after being hired by ARCO. In support of this, plaintiff submits four internal ARCO memo's dated January 22, 1990 to February 9, 1990 from G. L. Mallory and/or Barbara Guido stating unequivocally that the above-named individuals

[1]Plaintiff raises two other objections that the Court finds to be without merit. First, plaintiff argues that defendants' motion is "fatally flawed" because it contains no supporting affidavit as required by Fed. R. Civ. P. 56(c). Plaintiff's reading of the Rule is mistaken, as there is no requirement of affidavits. Further, all the facts in defendants' motion relied on by the Court are supported by exhibits. Second, plaintiff argues that the Lyondell Benefits Committee had a conflict of interest "because a decision favorable to Crimmins increases Lyondell's exposure to make additional payments necessary to keep the fund actuarially sound." All employers who act as their own benefits administrators necessarily have some degree of conflict, but this is hardly the type of significant conflict that would warrant a modification of the arbitrary and capricious standard as contemplated in Kotrosits v. GATX Corp. Non-Contributory Pension Plan for Salaried Employees, 970 F.2d 1165, 1173 (3d Cir), cert. denied 506 U.S. 1021 (1992).

would be receiving credit for their ENARCO service. In their motion for summary judgment, defendants submitted a memo dated July 13, 1990 from Cindy Bengtson informing Ms. Guido that the ACC Plan does not include a provision for recognizing ENARCO service.

On March 1, 1999, the Court Ordered supplemental briefs from the parties on this issue, to reconcile the apparent inconsistency, and determine whether or not the three employees received credit for their ENARCO service. Nowhere in plaintiff's reply brief does he provide evidence in support of his contention that the three ENARCO employees have actually received credit under the ACC plan.[2] Defendants' reply argues, with supporting affidavits, that none of the individuals received credit under the ACC Plan for ENARCO service. It is clear to the Court based on the submissions of the parties that there are no genuine issues of material fact as to the fact that the three employees did not receive credit under the ACC Plan.

Plaintiff also alleges that the Lyondell Committee exhibited arbitrary and capricious conduct when the Committee allegedly mischaracterized plaintiff's argument. To the contrary, the only mischaracterization the Court can find is plaintiff's mischaracterization of his claim before the Lyondell Committee.

On numerous occasions throughout the appeals process, plaintiff emphasized that his principle claim was his alter ego argument under Lumpkin. In Lumpkin, the Seventh Circuit defined

[2]Plaintiff makes several tangential arguments in support of his position, but they are irrelevant to the core question of whether or not these individuals actually received credit.

the alter ego doctrine as a doctrine whose purpose is to prevent a corporation that has acted fraudulently or unjustly from protecting itself from liability by using the corporate form. Id. at 460. They applied this doctrine to an ERISA case where a plaintiff alleged control, fraud, and undercapitalization against a parent when its two subsidiaries declared bankruptcy while owing millions to a pension fund. Id. at 460. The Court finds as a matter of law that Lumpkin and the alter ego doctrine are inapplicable to the facts of this case, as there is no evidence defendants did anything with fraudulent intent, or are using the corporate form merely to insulate themselves from pension liability. Lumpkin does not address the issue of who is to be considered an employee under ERISA, which is what plaintiff is contending now was his chief argument to the Lyondell Committee. Plaintiff also cites Teamsters Pension Trust Fund v. H.F. Johnson, 830 F.2d 1009 (9th Cir. 1987) in his letter of September 22, 1998. Johnson is a withdrawal liability case that bears no resemblance, and has no relevance, to the issues of this case. It also does not address when under ERISA someone is to be considered an employee. There is no evidence of record that plaintiff's argument that he should be treated as an employee of ARCO was clearly presented to the Committee. A parenthetical mention of the acronym ERISA, and several letters that do not even cite a Supreme Court decision hardly makes it clear that plaintiff was arguing for the Committee to consider how the Congress and Supreme Court have defined the term "employee." This is particularly true in light of plaintiff's emphasizing in both letters that the claim was focused on an alter ego theory,

and the cases he supported in support of his argument containing no discussion of the definition of the term employee. The only argument it is clear plaintiff made is his alter ego argument, and defendants adequately addressed that argument.[3]

Plaintiff then complains that the Committee "perverted" the principal claim by stating as the first reason for denying the claim that the Plan does not support service recognition for ENARCO employees. Plaintiff claims that this is the equivalent of the Committee converting his principal claim into one he was not making, and ignoring his true principal claim of federal law requiring a finding of an employer/employee relationship.

Defendants' reiteration of the core reason for their denial of plaintiff's claim is hardly a perversion of his argument, particularly when the Committee specifically addressed the plaintiff's alter ego theory in their letter denying his appeal. In short, there is no evidence that defendants mischaracterized plaintiff's claim, let alone evidence to suggest such alleged mischaracterization is the equivalent of arbitrary and capricious conduct on the part of the defendants.

Finally, plaintiff complains that the Lyondell Committee's statement that ENARCO maintained its own pension plan for ENARCO employees also evidences arbitrary and capricious conduct, since ENARCO had no such Plan. The Court agrees with plaintiff that

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[3]It may be that plaintiff provided other cases to the defendants for their review, but his exhibits fail to demonstrate that any cases aside from the two mentioned by the Court were presented to defendants in support of his position. To the extent any other cases were provided, and to the extent they relate to plaintiff's alter ego argument, the Court finds that the alter ego argument is not applicable to the facts of this case. To the extent these cases may have been related plaintiff's theory that he was an employee of ACC, that theory will be discussed infra.

there is no evidence to suggest that ENARCO ever had a pension plan for its employees, so the Lyondell Committee's statement in this regard is clearly wrong. This wrong statement does not undermine the Committee's opinion, however, because it is not necessary to their conclusion that the plain language of the ACC Plan does not support service recognition for ENARCO employees. The conclusion reached by the Committee concerning the plain language of the ACC Plan is not without reason, is supported by substantial evidence, is not erroneous as a matter of law, and therefore is not arbitrary and capricious.

B. Wolf v. National Shopmen Pension Fund

Although the Court has ruled that defendants' decision was not arbitrary and capricious as to the arguments before it, that does not end the inquiry. In Wolf v. National Shopmen Pension Fund, 728 F.2d 182 (3rd Cir. 1984) the Third Circuit held that Section 502(a) of ERISA does not require issue or theory exhaustion, only claim exhaustion. Id. at 186. Their decision permitted the plaintiff to argue a theory not presented during the administrative process. The Court went on, "[i]n short, unless we can find that the challenged decision was not 'rational', we must uphold the decision of the Pension Fund." Id. (citations omitted).

The Court in Wolf then considered plaintiff's argument, not presented to the pension fund Trustees, challenging the validity of a deceased husband's waiver of his wife's rights to 50% of the pension benefits. Id. at 186-187. Based on their analysis of the plan language, the Court found that the Trustees' decision was arbitrary and capricious because the deceased husband never

elected to waive his wife's rights. Under Wolf, this Court must therefore consider whether or not the Lyondell Committee's decision was arbitrary and capricious in light of plaintiff's argument in his motion for summary judgment that he should be considered an employee of ARCO for purposes of plan inclusion under ERISA.[4]

C. Plaintiff's Motion for Summary Judgment

At the outset, the Court notes that this is a far different situation then the one faced by the Third Circuit in Wolf. In that case, the Court did a straightforward analysis of the pension plan language, and found three separate errors in the Trustees' interpretation and application of the plan terms. Based on those findings, it was evident that the Trustees decision did not consider the relevant factors, and demonstrated a clear error in judgment. In the instant case, both parties agree that, according to the language of the ACC Plan, plaintiff was not an employee. Plaintiff is instead asking this Court to conclude that the Lyondell Committee's decision was arbitrary and capricious when they did not conclude plaintiff was an employee, despite the Plan's clear language that plaintiff was not an ACC employee. This is a heavy burden for plaintiff, but one that Wolf suggests he should have the opportunity to carry.

As noted previously, plaintiff agrees that he is not an employee of ARCO as defined by the ACC plan, but he argues that no employer can interpret the term "employee" as used in the

[4]Plaintiff also argues his alter ego theory in his motion for summary judgment, but the Court has already ruled that defendants' decision was not arbitrary and capricious as to that issue and will not consider it further.

pension documents less restrictively than the term "employee" is defined by ERISA.[5] Nationwide Mut. Ins. Co. V. Darden 503 US 318 (1992). Plaintiff contends that, under ERISA's definition of employee, he should be considered an employee, and is therefore entitled to credit for his time at ENARCO because it was really spent working for ARCO. ERISA defines "employee" as "any individual employed by an employer," 29 USC § 1002(6). As the Darden Court noted, this definition is "completely circular and explains nothing." Id. at 323. Darden expressly adopts the following common law test for determining who qualifies as an employee under ERISA:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden at 323-324, citing Community for Creative Non-Violence v. Reid, 490 US 730, 751-752 (1989)(citations omitted). Although this test is traditionally employed in the context of

[5]Defendants chose not to directly address the arguments raised by plaintiff in his motion for summary judgment on this issue, instead resting on their assertion that it was not arbitrary and capricious for the Committee to conclude plaintiff was not an employee as defined by the ACC Plan.

determining whether an individual is an employee or an independent contractor, it also has applicability in the instant case, with some modification, to determine which of two possible employers is the "true" employer. After carefully reviewing the record in this case, the Court believes it is insufficient to reach a decision as to whether ENARCO or ARCO was plaintiff's "true" employer. The court will revisit this issue when the parties more fully develop the record and their arguments under a Darden analysis.

The other argument of plaintiff's that is worth developing further, and perhaps the more appropriate analysis for the facts of this case, is his "joint employer" theory. Although not entirely clear, plaintiff seems to be arguing in the alternative that even if defendants are not his "true" employer, plaintiff is entitled to credit for his time at ENARCO because ARCO was a "joint employer" of plaintiff under N.L.R.B. v. Browning-Ferris Industries, 691 F.2d 1117 (3rd Cir. 1982).

In Browning-Ferris, the Third Circuit reviewed an administrative decision by the N.L.R.B. that found Browning Ferris ("BFI") to be a joint employer of drivers furnished to it by independent brokers. After reaching this conclusion, the N.L.R.B. then found that BFI had engaged in unfair labor practices when it fired three drivers jointly employed by it and its brokers, and ordered make whole relief including reinstatement and back pay. Id. at 1119.

In upholding the decision, the Third Circuit said that

determining joint employer status is "a matter of determining which of two, or whether both, respondents control, in the capacity of an employer, the labor relations of a given group of workers." Id. at 1122-23 (citations omitted). "The basis of the finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Id. at 1123. The Court then summarized the inquiry as follows: "where two or more employers exert significant control over the same employees-where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment-they constitute joint employers within the meaning of the NLRA." Id. at 1124 (citations omitted).

In Local 773 v. Cotter & Co., 691 F.Supp. 875 (E.D.Pa. 1988), the district court enunciated the following regarding joint employer status: "[t]o establish joint employer status, plaintiff must show that the supposed joint employer 'meaningfully affects' matters relating to the employment relationship[.]" Id. at 875. The district court then listed five factors to consider to determine if an employer "meaningfully affects" an employment relationship. These factors are (1) hiring and firing; (2) discipline; (3) wages, insurance, and records; (4) day to day supervision and direction; and (5) participation in collective bargaining. Id. at 880-881. All but

number five are applicable in the instant case.

Unfortunately, as with plaintiff's Darden argument, defendants chose not to directly address plaintiff's argument, so there is no evidence submitted from them concerning the nature of the relationship between the different companies regarding employees, and in particular the plaintiff. The Court therefore is restricted to a consideration of plaintiff's arguments and evidence.

The structure of plaintiff' briefs, however, has made it difficult for the Court to consider his arguments and evidence. Plaintiff has chosen a unique bifurcated approach to presenting his position that makes it difficult and tedious to ascertain exactly what he is arguing. In his Motion for Summary Judgment, plaintiff lists facts in support of his various arguments. In his Memorandum of Law, he basically takes excerpts from cases to establish his arguments. With few exceptions, he makes no attempt to logically or coherently develop a position, using facts and law to construct an argument. It would be inappropriate for the Court to make his arguments for him. For this reason and because the Court finds that the factual record as a whole is insufficient to support a summary judgment ruling in plaintiff's favor, the Court will deny plaintiff's motion.

Because the Court believes that plaintiff's Darden and Browning-Ferris arguments have been inadequately addressed by either party, and because the Court still adheres to the belief that this case can ultimately be resolved on summary judgment,

the Court will grant the parties thirty (30) days to conduct discovery relevant to those issues, and Order the parties to submit cross-motions for summary judgment at the end of that time limited solely to these issues. In addition to addressing Darden and Browning-Ferris as described above, the Court would like the parties to focus on the following issues: (1) the applicability of the two doctrines to the facts of this case, particularly the use of the joint employer doctrine in an ERISA context; (2) whether an employer can be found to be a joint employer for some employees but not for others, and/or whether ACC is the joint employer of the plaintiff; and (3) assuming arguendo plaintiff is entitled to be considered an employee of defendants under either of the two theories, whether the Lyondell Committee's denial of his request can be called arbitrary and capricious.

IV. Conclusion

For the foregoing reasons, the Court will deny plaintiff's motion for summary judgment for the time being, and grant defendants' motion for summary judgment as to the issues raised therein, but will not enter judgment in favor of either party pending the parties' rebriefing and the Court's decision on the Darden and Browning-Ferris issues.

An appropriate Order follows.

Clarence C. Newcomer, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICK J. CRIMMINS	:	CIVIL ACTION
	:	
v.	:	
	:	
ARCO CHEMICAL COMPANY, et al.,	:	NO. 98-4251

O R D E R

AND NOW, this day of April, 1999, upon consideration of the parties' Cross-Motions for Summary Judgment, plaintiff's response thereto, the parties' responses to the Court's Order of March 1, 1999, and consistent with the foregoing Memorandum, it is hereby ORDERED that said Motions are DENIED in part and GRANTED in part. IT IS FURTHER ORDERED that plaintiff's motion is DENIED for the time being. IT IS FURTHER ORDERED that defendants' Motion is GRANTED as to the issues raised therein, but their Motion is DENIED to the extent they request judgment to be entered in their favor. IT IS FURTHER ORDERED that the parties have thirty (30) days from the date of this Order to conduct discovery limited to the Darden and Browning-Ferris issues as described in the foregoing Memorandum. IT IS FURTHER ORDERED that the parties shall submit revised cross-motions for summary judgment on the above issues by May 14, 1999.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.